

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BABYAGE.COM, INC. et al.,)	
)	
Plaintiff-Counterclaim Defendants/,)	
Third Party Defendants,)	No. 3:07-cv-01600-ARC
)	
v.)	(Judge A. Richard Caputo)
)	
LEACHCO, INC. et al.,)	(electronically filed)
)	
Defendant-Counterclaim Plaintiffs/)	
Third Party Plaintiffs.)	

**REPLY BRIEF OF LEACHCO, INC. AND JAMIE S. LEACH
ON MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER**

Babyage first argues that Leachco and Mrs. Leach should have made a motion to extend the amended pleadings deadline imposed in the case management Order. Doc. 74 at 2. But the Plaintiff's Brief specifically addresses the deadline imposed by the case management order, and explains why that deadline could not be met, due to Babyage's delay in discovery responses. Doc. 73 at 1-4. There is no reason why the Order's deadline for amended pleadings needs to be extended across the board, as Babyage argues. Instead, Leachco and Mrs. Leach need only be granted relief from the deadline with regard to the particular amended pleading they seek to file here. To require a separate motion to change the case management order's deadlines in these circumstances would be to elevate form over substance.

Babyage next argues that Leachco and Mrs. Leach could have filed their motion to amend on or before the July 31 deadline. Doc. 74 at 3. We disagree. Late on the afternoon of July 30, one day before the deadline for motions to amend pleadings, the undersigned received a large box from Babyage filled with over 2,000 pages of documents. Among those 2,000 pages were the answers to interrogatories that established the falsity of the Babyage patent pending claim. It is simply not reasonable to expect anyone to drop everything and read through 2,000 pages of documents

immediately upon receipt, as Babyage argues. A project of this size would require several days to complete, at the very least. Leachco and Mrs. Leachco thus could not reasonably have been expected to have filed their motion before the amended pleadings deadline.

The week after the amended pleadings deadline, on August 5, the undersigned contacted Babyage counsel and asked him to confirm that the interrogatory answer about pending patent applications was correct. The undersigned also told Babyage that if the answer was indeed correct, leave to file a false marking counterclaim would be sought. See Exhibit A, which is an email sent to Babyage counsel on August 5. Rather than responding immediately, Babyage counsel instead delayed another 9 days before finally confirming to the undersigned that the interrogatory answer was correct. The motion to amend was filed the very next day.

Finally, Babyage argues that the discovery deadline may have to be extended. Doc. 74 at 3. Why? The falsity of the Babyage patent pending advertising has already been admitted by Babyage. Whether this false advertising was done with intent to deceive the public is a matter for a jury to decide. Leachco and Mrs. Leach have already served all of their discovery requests, and have no plans to serve any more. Babyage has yet to serve any discovery requests. Depositions have not yet been taken in the case, primarily due to Babyage's delays in responding to discovery requests. Thus, any depositions that are taken can address the false marking claim along with the rest. There is no reason whatever why discovery would have to be extended if the false marking counterclaim were added.

Babyage's claim that this motion comes too late can only be characterized as ironic, given its own protracted delays both in furnishing discovery and responding to inquiries by Leachco counsel. Relief from the deadline imposed by the case

management order, and leave to file the proposed amended pleading, should accordingly be granted.

Respectfully submitted,

s/ Gary Peterson

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CERTIFICATE OF SERVICE

I certify that I electronically transmitted this document to the Clerk using the ECF System so as to cause transmittal of a Notice of a Electronic Filing to the following ECF registrant:

Andrew J. Katsock, III

Attorney for Defendant, on August 29, 2008.

s/ Gary Peterson